SUPREME COURT, U. S.

Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 504

STEVEN IMBURGIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 6, 1970

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The Petitioner, Steven Imburgia, prays that a Writ of Certiorari issue to review the judgment entered on July 9, 1970, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee vs. Steven Imburgia, Defendant-Appellant, Docket No. 34525.

Opinions Below

The judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit in open Court with no opinion. The judgment of the Court of Appeals appears in the Appendix at p. 8.

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1 Whether it was proper for the Circuit Court of Appeals to condone the finding of the District Court that the Petitioner was adequately advised of his Constitutional right to remain silent.

2 Whether the Circuit Court of Appeals acted properly in affirming the District Court's finding that Petitioner's right to testify in his own behalf was not prejudiced.

Statutory Provisions

Title 18, United States Code, Section 472, provides:

> . . . Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both . . .

Title 18, United States Code, Section 371, provides in part:

> . . . If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . .

Title 18, United States Code, Section 2, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Constitutional Amendment

Amendment V. Grand Jury Indictment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.

Statement of the Case

The facts which underlie the decision below relate to certain incriminating statements made by the Petitioner to agents of the Secret Service subsequent to the Petitioner's arrest. Petitioner was not immediately before the Government began its case in chief on direct examination with respect to the admissibility of these statements. [R.]. The Government informed the Court when he announced [illegible] of utilizing the statements at trial. The question of these statements arose because Petitioner's counsel stated [illegible] that these admissions would not be introduced if Petitioner were to testify in his own behalf. The

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Note: [illegible] for the Second Circuit.

attorney declined to make this representation and it was, therefore, necessary to conduct a voir dire examination to determine whether these statements were made voluntarily (R 168).

The circumstances under which the Petitioner's admissions were taken were related through the testimony of Secret Service Agent George J. Sershen. Agent Shershen testified that prior to taking any statements he informed the Petitioner that he did not have to make any statement (R 171). Agent Sershen's testimony was as follows:

> "Q. And one of those Constitutional rights, sir, and I'm reading from Court Exhibit 3 which is your statement is that he did not have to make any statement, is that right? A. That's true.
>
> Q. That was the warning you gave him, isn't that right? A. Yes, sir.
>
> Q. And I'm going to show this to you again, because you have spelled out all the Constitutional warnings that you gave him in Court Exhibit 3.
>
> Will you tell me, sir, whether those were exactly the same warnings that you gave him on that day? A: About the same, sir.
>
> Q. About the same? A. It's essentially the same—
>
> Q. There is no question that the fact that you told him that he did not have to make a statement? A. Absolutely not.
>
> Q. Isn't that right? A. Yes." (R 170-171)

Agent Sershen further testified that in addition to the oral information he gave the Petitioner with respect to his rights, he had subsequently presented the Petitioner with a written form which contained the prescribed Constitutional warnings (A 173). The Petitioner herein urged on Appeal that the oral warning given to him was intrinsically

defective and that the presentment of the written statement of rights failed to cure that defect. The net result of the District Court's ruling that these admissions were voluntarily made was that the Petitioner was denied the right to present a defense by testifying in his own behalf without these admissions being introduced. The District Court had denied Petitioner's motion to suppress these statements and trial counsel, after an unsuccessful attempt to have the Government not employ these admissions, stated for the record as follows:

> "Mr. La Rossa: The defendant rests, Your Honor. I might add that the defendant has not been informed that the Government would not use the statement and on that basis the defendant rests." (R 186)

The Circuit Court of Appeals in affirming the judgment of the District Court without opinion, apparently concluded that the warning sufficed under *Miranda* v. *Arizona*, 384 U.S. 136 (1966).

Reasons for Granting the Writ

The decision of the Court of Appeals on the issue of the sufficiency of the warnings given to petitioner does not properly reflect the intention of the United States Supreme Court's decision in *Miranda* v. *Arizona*.

This Court, in the landmark decision of *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966), set forth the now well established rule that

> ". . . if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent . . . More important, such a warning is an

absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere".

This rule was amplified by the Second Circuit Court of Appeals in *United States* v. *Fox*, 403 F. 2d 97 (2nd Cir. 1968) which held that warning a criminal defendant that "he does not have to make any statement" will not satisfy the requirements set forth in *Miranda (supra)* that a defendant must be told that he has the right to remain silent. The Court's reasoning in *Fox* was that

> "Miranda requires that the accused be told that he has 'the right to remain silent . . . .' This [that defendant didn't have to make any statement] is by no means the same thing. It could easily be interpreted to mean that Fox did not have to make a formal statement rather than he need not answer any questions or say anything at all." (p. 100)

Two recent decisions of the Second Circuit Court of Appeals, *United States* v. *Lamia*—slip op. 537, decided June 25, 1970, and *United States* v. *Testa*—slip op. 531-535, decided June 25, 1970, Petition for Certiorari filed July 24, 1970 October Term, 1970, 439, together with the decision in the case at bar, casts a serious question as to the interpretation of this Court's decision in *Miranda (supra)* with respect to the manner and form of the Constitutional warnings which this Court has prescribed. It is respectfully urged that review by this Court is necessary to precisely clarify this question which is so fundamental and important to the administration of criminal justice in the United States.

Petitioner Steven Imburgia further urges that if this oral warning was found to be defective, the written statement of rights which was subsequently presented to the Petitioner

and which contained the warning that "you have the right to remain silent" (R 180) did not cure the defective oral warnings. There was absolutely no indication that the Petitioner was made to understand that the subsequent written warning differed in any way from what he had been told orally. In view of the inherent problem of in custody interrogation, it is illogical to assume that the Petitioner made this distinction. See *Gilpin* v. *United States*, 415 F. 2d 638 (5 Cir. 1969).

In order that this Court may remedy the Court of Appeal's misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

Conclusion

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Counsel for Petitioner

August 6, 1970

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROY A. DEMEO and STEVEN IMBURGIA,

Defendants,

STEVEN IMBURGIA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed.

A. DANIEL FUSARO,
Clerk